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APPELLANTS' BRIEF

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Supreme Court of the United States

OCTOBER TERM, 1929

No. 424.

IKE DANOVITZ, SURVIVING PARTNER OF FEITLER BOTTLE COMPANY, CLAIMANTS, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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Opinion of Court Below.

The opinion of the Circuit Court of Appeals for the Third Circuit, in this case, is reported in 34 F (2d) 30.

Jurisdiction of the Supreme Court.

Writ of Certiorari was granted in this case on November 4, 1929, and is reported in 280 U. S. 28A (Prelim. Print), 50 Sup. Ct. 69, 74 L. ed. 107 Adv. Opin.

In its order this Court made the limitation "that counsel shall confine themselves, in the briefs and oral argument, to the question whether the property seized is for-

feitable under Section 25, Title II, of the National Prohibition Act (27 U. S. C. A. §39)."

Statement of the Case.

The Feitler Bottle Company, of which the appellant is surviving partner, conducted a merchandising business in empty bottles, new and used, and in empty used whiskey barrels, of which some 400 were seized, together with cartons, wrapping paper, corks, paper bags, crimping and labeling machines, and a large variety of articles incident to the merchandising of such articles, together with books of account, office supplies, typewriter, adding machine, check protector, files, ink, step ladders, screw driver and hammer, and a large variety of articles incident to carrying such a business, keeping accounts, records, etc. With the exception of the alleged whiskey, which was not proved (Record, p. 36), and was, in fact, mere barrel drainings taken from the barrels by the agents at the time of the raid (Record, pp. 18, 19), the list of articles seized is set forth in the libel (Record, p. 3) and in the answer (Record, p. 7).

The Government has practically admitted the illegality of the seizure of the articles mentioned in the answer (Record, p. 7), but those articles have not even yet been returned, except a few of them also listed in the answer (Record, p. 9).

The United States filed a libel, under Section 25 of Title II of the National Prohibition Act for the forfeiture of part of the articles seized, namely, the articles listed in the libel (Record, p. 3). The answer, in at least three places, paragraphs 1, 2 and 4 (Record, p. 6), denies that the

articles seized were contraband, or were designed for the manufacture of contraband liquor, or were subject to forfeiture. Yet the District Court, in disregard of the law (as appellant claims), ruled that the Government is entitled to a decree of forfeiture (Record, p. 50), and decreed forfeiture (Record, p. 56).

Upon appeal, the Court of Appeals for the Third Circuit affirmed the District Court in an opinion teeming with unsupported inferences of fact, misstatements of the evidence and erroneous interpretations of law. From the order thus made this appeal was taken.

Specification of Assigned Errors Intended to be Urged.

The Court having directed "that counsel shall confine themselves, in the brief and oral argument, to the question whether the property seized is forfeitable under Sec. 25, Title II of the National Prohibition Act," the assigned errors intended to be urged are limited to the first and third Assignments of Error, as follows (see Record, p. 62):

First. The Court erred in holding that empty containers, empty bottles and barrels, cartons, corks, cases, caps, labels and similar articles, are forfeitable under Section 25 of Title II of the National Prohibition Act (27 U. S. C. A. 39).

Third. The Court erred in finding facts which had not been found by the District Court, for which there was in-

adequate evidence and which prejudiced claimants by the Court holding that such facts were sufficient evidence under Section 25 to warrant the court in decreeing a forfeiture of empty containers, which the Court admits could not be forfeited, if "standing alone", under the provisions of Section 25 of Title II of the National Prohibition Act.

Argument.

I. INTRODUCTION AND SUMMARY.

The seizure in this case was made, and forfeiture is claimed, solely in reliance upon the authority granted by Section 25, Title II of the National Prohibition Act, which section, as incorporated in the Code as 27 U. S. C. A. 39, reads in full as follows:

> "It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this chapter or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in sections 434 to 454, and 456 of Title 17, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the court shall otherwise order. No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or

unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. The term 'private dwelling' shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house. The property seized on any such warrant shall not be taken from the officer seizing the same on any writ of replevin or other like process."

Under a warrant authorizing search and seizure of liquor and property designed for the manufacture of liquor intended for use in violating the prohibition law, agents seized a large quantity of merchandise from the Feitler Bottle Company, a firm dealing in empty barrels, empty bottles, corks, cartons, and similar articles, namely, *containers*, as distinguished from materials out of which liquor can be made, and utensils usable in the manufacturing process.

Part II of this Argument will be devoted to the proposition that empty containers are not usable in the *manufacture* of intoxicating liquor, but can be used *only after* the manufacture is complete, so that *empty* containers are not to be considered as coming within the meaning of the words "property designed for the manufacture of liquor." If so, empty containers are neither seizable nor forfeitable. Containers which are *not empty* are expressly made seizable and forfeitable by Section 25 by the words "and such liquor, *the containers thereof*, and such property so seized shall be subject to such disposition as the court may make thereof." When Congress drew the line so clearly between what articles may be seized and forfeited, and what articles may not be seized and forfeited, and distinguished

between empty and filled containers, where is there any room for the involved arguments as to construction of this statute in which the Court of Appeals indulged?

Part III of this Argument will be directed to the question as to whether used whiskey barrels, some of them containing what the agents called "whiskey-chips," and all having an odor of whiskey still lingering therein, should or should not, in this case, be considered "empty containers," so as to come under the reasoning and argument of Part II or whether they are articles from which liquor might or could be manufactured, and so not covered by the reasoning of Part II.

In Part III will also be considered the dispute as to whether the agents found what should be considered "liquor" by the courts, or whether the liquids claimed to be illegally possessed liquor should not be entirely disregarded as being mere barrel drainings made by the agents themselves.

Part IV of the Argument will consider what is meant by the word "designed" in Section 25, showing that the phase "property *designed* for the manufacture of liquor intended for use in violating this chapter or which has been so used" means not merely property which might or could be so used, but also that was or is *intended by the owner or one in possession* to be so used *by him himself* or which has, *by such owner or possessor,* been so used.

If such is the law, then a dealer holding for sale has no illegal possession, whatever may be the intention of one who buys from him, and whatever may be the dealer's suspicions, or even knowledge, as to the use to which his buyers

would probably put the property which he sells them. Section 18 of Title II will be considered in this connection, and it will be shown that this section, while providing criminal penalties, does not provide for seizure and forfeiture.

Part V of the Argument will treat in some detail of the errors, fallacies and misstatements of the Court of Appeals.

That Court relied on Section 18, Title II of the National Prohibition Act, incorporated in the Code as 27 U. S. C. A. 30, which section is:

> "It shall be unlawful to advertise, manufacture, sell, or possess for sale any utensil, contrivance, machine, preparation, compound, tablet, substance, formula, direction, or recipe advertised, designed, or intended for use in the unlawful manufacture of intoxicating liquor."

How the Court of Appeals could strengthen its argument against claimants by referring to this section is beyond the understanding of counsel, except on the theory that the Court failed to note the obvious fact that *empty containers* are not covered by or included in any article mentioned in that section.

Many of the erroneous statements of fact and law made by the Court of Appeals about the business of claimants will be pointed out, and it will be shown that the Court of Appeals saw fit to state as *facts* allegations that there was no evidence of whatever and which were not found or even assumed by the District Court who heard the evidence and the arguments of counsel which do not show of record.

It is further shown in Part V that many of the statements of law made by the Court of Appeals are entirely unsound, one being unsound even to the point of absurdity.

II. THE SEIZED MERCHANDISE, BEING MOSTLY EMPTY CONTAINERS, WAS NOT USABLE IN THE "MANUFACTURE" OF LIQUOR, AND THEREFORE NOT SEIZABLE OR FORFEITABLE UNDER SECTION 25 OF TITLE II OF THE NATIONAL PROHIBITION ACT.

The exact point here made relates not so much to the meaning of the word "designed" as used in Section 25 of Title II as to the meaning of the word "manufacture" as there used.

Practically every article included in the libel in this case comes within the term *empty containers,* being such articles as empty barrels, empty bottles and corks, cartons, paper wrappers, paper bags, caps for bottles, labels, wrapping paper, empty jugs, empty demijohns, empty cans, cardboard, sealing wire, twine and cardboard cases, together with such utensils as are used in *bottling,* as distinguished from *producing* or *manufacturing,* such as siphons and filters, crimping machines and labeling machines.

This list is given so that it may be clear that the stock in trade consisted of *containers* and associated articles, and did not come within the meaning of "property designed for the *manufacture* of liquor" unless it be held that empty containers come within the meaning of that term. The few articles included in the libel and not in the above list (such as the alleged jugs of whiskey and a small amount of flavorings and syrup) are left for consideration to the next part of this Argument, since it is desired to confine this part

of the Argument to a consideration of the status of empty containers under Section 25.

The act or process of the *manufacture of liquor* is complete with its production and placing in the receiving tub, tank or cistern.

The placing of the liquor in barrels, bottles, casks or kegs comes later, and is *always* separated from the manufacturing process by a greater or less but necessarily appreciable, period of time.

If this distinction is sound, then Section 25 does not authorize the seizure and forfeiture of empty containers, being limited by its terms to "property designed for the *manufacture* of liquor."

When the National Prohibition Act was passed by Congress the distinction herein made was already in the laws of the United States and had been there for two generations.

As was said by this Court in the case of *United States v. Katz* [1926], 271 U. S. 354, 46 Sup. Ct. 513, 70 L. ed. 986, "Congress had before it the provisions of the Revenue Law governing distillers, rectifiers, and brewers," when the National Prohibition Act was passed.

Among those provisions is the definition of the most important (from both the taxation and prohibition point of view) manufacturer of liquor, namely of "distiller." It will be noted that this definition is carefully so worded as *not* to include the placing of liquor in containers. Reference is made to Section 3247 of the Revised Statutes:

"Sec. 3247. Every person who produces distilled spirits, or who brews or makes mash, wort, or wash, fit for distillation or for the production of spirits, or who, by any process of evaporation, separates alcoholic spirit from any fermented substance, or who, making or keeping mash, wort, or wash, has also in his possession or use a still, shall be regarded as a distiller."

That the process of manufacture of spirits should be regarded as complete under the Revenue laws *before* the spirits are placed in casks, barrels or bottles for storage or removal may be seen from the terms of Section 3267 of the Revised Statutes, as follows:

"Sec. 3267. The owner, agent, or superintendent of any distillery established as hereinbefore provided. shall erect in a room or building to be provided and used for that purpose, and for no other, and to be constructed in the manner to be prescribed by the Commissioner of Internal Revenue, two or more receiving-cisterns each to be at least of sufficient capacity to hold all the spirits distilled during the day of twenty-four hours, into which shall be conveyed all the spirits produced in said distillery; * * * On the third day after the spirits are conveyed into such cistern they shall be drawn off into casks, under the supervision of such gauger, in the presence of the storekeeper, and be removed directly to the distillery warehouse * * *"

These provisions have been referred to by their Revised Statutes number in order to indicate their antiquity; but they have been carried into the Code as, respectively, 26 U. S. C. A. 241 and 292.

With such provisions as these in the laws of the United States for half a century, showing that the process of "manufacture" ended with production, and did not include placing in containers, it is not to be supposed that the word "manufacture" would have any different meaning when used in the National Prohibition Act. Nor did those familiar with the internal revenue laws who were placed in charge of enforcement of the prohibition law ever suppose that empty containers came within the provisions of Section 25.

It was left for those unfamiliar with the revenue laws, in charge of enforcement of the prohibition laws after the separation of the Bureau of Prohibition from the Bureau of Internal Revenue by the Act of March 3, 1927, 44 Stat. 1381, 5 U. S. C. A. 281 to 281 d to assume or claim that containers were usable in manufacture. This case, begun by a seizure on May 10, 1928, was the first case of the kind in the United States, so far as counsel knows, and in spite of the fact that large numbers of barrel and bottle dealers, in every city in the country, have sold their goods continuously, both before and since the Eighteenth Amendment and the National Prohibition Act went into effect, to whatever purchasers presented themselves, undoubtedly to bootleggers among others, in exactly the same manner as the Feitler Bottle Company may have done.

As used in Section 25 of Title II, the term "property designed for the manufacture of liquor intended for use in violating this chapter" has a dual meaning, as follows:

(a) The property must be *usable* in the process of making liquor.

(b) The property must be intended *by the owner* to be so used *by himself.*

This was held by the Court of Appeals for the First Circuit in the recent case of *Kohler Co. v. United States* [1929, 1st Cir.], 33 F (2d) 225, in these words:

> "We have no doubt that if utensils and materials *usable* in the manufacture of liquor are, *by the actual owner thereof,* assembled and *intended* for use or used in such illicit manufacture, Section 25 makes such utensils and materials contraband; that they are 'designed' for illicit use within the meaning of Section 25 and subject to forfeiture."

In that case the Government sought the forfeiture of an independent electric plant owned by the claimant, the Kohler Co., and leased by them to the Elk Breeding Association. The plant was set up at the Association's farm, ostensibly for lawful purpose. It was, however, connected by wire with an illicit distillery, and the electricity which was generated was actually used in the operation of the still. The District Court decreed forfeiture on the theory that the electric plant, having been actually used in the manufacture, came within the meaning of the words in Section 25 "or which has been so used." On appeal, the Court of Appeals reversed, holding that only "property designed for the manufacture of liquor" could be forfeited, that the words "or which has been so used" refer only to property which is "designed for the manufacture of liquor," and that an electric plant is not such property, but is designed for other purposes than the manufacture of liquor.

In the same way, empty containers are designed for another purpose than the manufacture of liquor, and cannot be used in the process of "manufacture" even as much as can an electric light plant.

In the *Kohler* case the Government petitioned for a writ of certiorari, but the petition was denied. *United States v. Kohler Co.* [1929], 280 U. S. 76A (prelim. Pr.), 50 Sup. Ct. 69, 74 L. ed. 107 (Adv. Opin.).

The Court of Appeals, in its opinion in the *Kohler* case, based its decision largely upon the broad ground stated by this Court in the case of *Street v. Lincoln Safe Deposit Company* [1920], 254 U. S. 88, 41 Sup. Ct. 31, 65 L. ed. 151, 10 A. L. R. 1548, as follows:

> "An intention to confiscate private property, even in intoxicating liquors, will not be raised by inference and construction from provisions of law which have ample field for other operation in effecting a purpose clearly indicated and declared."

In the *Street* case the Court was considering in part the meaning and application of Section 25, under which the seizure in that case was made.

It is submitted that the Court of Appeals in this case did exactly what this Court, in the *Street* case, said should not be done, namely, by "inference and construction" they convinced themselves that Congress had expressed an intention to confiscate empty containers, and they did this by extending and enlarging provisions of law "which have ample field for other operation in effecting a purpose clearly indicated and declared."

What is that "ample field for other operation" in the case of Section 25?

The answer is obvious, but one case might be cited. In the case of *United States v. 63,250 Gallons of Beer* [1926, Mass.], 13 F (2d) 242, the search warrant was specific in naming "kettles, vats, tanks, pipes, washer, refrigerating machine, racking and other apparatus and machinery usually found in breweries, and including dynamos, pumps, hose, pipe, engines and boilers, and a quantity of mash, malt, hops, syrup, sugar and yeast." In a case which included as forfeitable such doubtful items as dynamos, pumps, engines and boilers, it is noteworthy that *empty containers* were not included. The explanation of that omission is, that "manufacture" ends *before* barreling, bottling and casing, and that the sharp distinction of the internal revenue laws was consciously or unconsciously observed.

The act or process of "manufacture of liquor" must end somewhere, and the act or process of storing, distributing and using must begin at the point where "manufacture" ends. More than sixty years ago Congress definitely and clearly placed the line of distinction at the logical point, namely at the receiving cistern, providing for a three days' delay at the end of the manufacturing process before the distributing process was allowed to begin (with exceptions in the case of emergency upon special application). There is everything to indicate that Congress carried the same thought into Section 25 of Title II of the Prohibition Law, and there is nothing to indicate the opposite.

Another point may be here noted. While it may be true that by custom certain sizes and shapes of bottles have come to be called "whiskey bottles" (of which many different shapes have long been in use), others are called "beer bottles," others "wine bottles," yet, in the final analysis, and for bootlegging purposes, *any* bottle may be

used almost, if not quite, as conveniently as the usual ones. The Court of Appeals was mistaken in its assumption that hampering and interfering with a bottle business would hamper bootleggers in their activities.

Congress has defined what seizures will hamper the illicit liquor traffic, namely, "property designed for the manufacture of liquor intended for use in violating" the law; but after the liquor has once been manufactured, any bottle can be used as conveniently as any other bottle for purposes of distribution. Why seek by construction and specious argument to extend the meaning of the words used by Congress? So doing would not in the slightest degree assist in the enforcement of the prohibition laws. It would only authorize and enable agents and officers of government to harass and intimidate business men who may happen, knowingly or unknowingly, to have bootleggers among their customers.

Certain articles possessed and used by bootleggers and moonshiners have been made contraband, namely, "property designed for the manufacture of liquor," but as yet bootleggers have not been made outlaws. It is still lawful to sell them other articles. They may lawfully buy, and others may lawfully sell to them, even knowing them to be bootleggers, such things as clothing, food, automobiles, houses, furniture, machinery, building materials, and all articles of lawful commerce and trade, even including bottles and empty containers. A dealer even under Section 18, may sell to a bootlegger property usable in liquor manufacture if he does not do it for the *purpose* of illegal manufacture.

If Congress, in Section 25, intended to authorize the seizure and forfeiture of empty containers, as the Court of Appeals made itself believe, why did Congress not expressly so state? Congress did not merely *forget* containers; they remembered them and thought of them, and, when they desired to make containers forfeitable, they expressly included them. But the containers they made forfeitable were not empty containers, they were the containers having illicit liquor in them. Such containers are included in the second sentence of Section 25 as forfeitable, in the phrase "and such liquor, *the containers thereof*, and such property so seized shall be subject to such disposition as the court may make thereof."

All of these direct evidences as to the meaning and intention of Congress in using the careful language of Section 25 of Title II are of such a nature, and of such weight, that there is no necessity nor propriety in resorting to canons of construction, or other arguments that, in case of doubt as to the meaning of a statutory provision, are called into service to resolve the doubt. Not only is there no doubt discovered upon examination of Section 25, but it is found that the line of distinction, at least as applied to the case now in hand, is extraordinarily clear and distinct.

III. AS TO THE STATUS OF THE SEIZED BARRELS AS "EMPTY CONTAINERS," AND OF CERTAIN OTHER ARTICLES NOT COVERED BY THAT DESIGNATION.

The 402 seized whiskey barrels were mostly *used* barrels, to which an odor of whiskey still clung. Many of them may have contained a few drops of whiskey which, upon emptying at the distillery warehouse from which they came, had not drained out but had adhered to the inside of the barrel.

Agents making the seizure drained these dregs of whiskey from the barrels (Record, pp. 18, 19, 20), and this draining by Government agents was the source of *all* of the three or four jugs listed by the agents as containing whiskey, of which more later.

It was testified that some of these barrels contained what the agents called "whiskey chips" and that by using water an alcoholic substance tasting like whiskey could be made from them. There was not one word of evidence that claimants used, or intended to use, the barrels in this way, and Mr. Danovitz, the appellant, in his testimony (Record, pp. 37, 38, 39 and 40), denied ever so doing and stated he knew nothing of "whiskey chips," but was simply dealing in empty barrels and bottles *not* making, possessing or selling liquor in any form.

Under this state of facts it is submitted that the barrels should be considered simply empty containers. The District Court so considered the case, holding that mere empty containers are subject to seizure and forfeiture, first, over the objection (Record, p. 11), that the libel does not set forth facts showing possession to be unlawful or that said property is subject to forfeiture, second, in overruling claimants' motion for the return of the property made after the Government rested (Record, p. 36), third, in the order for decree (Record, p. 50), and in the final decree (Record, p. 56). The District Court rested nothing whatever upon "whisky chips", and nothing whatever upon the alleged seizure of liquor, which, in truth and in fact, was dropped by the Government at the trial when Mr. Richardson, the attorney for the Government, stated (Record, p. 36): "I cannot, therefore, offer these three samples in evidence", there having been an understanding with the Court and be-

tween the Government and the claimants that samples would be furnished claimants for analysis and that no evidence of liquor would be introduced except by identifying it with those samples. When Mr. Richardson made that statement, the Court and all parties considered that "liquor" was definitely removed from the case.

The barrel drainings which were contained in the several jugs and cans were as black as ink, being made so by particles of charcoal from the inside of the barrels from which the agents drained it. The total amount collected from many barrels, including the water put in to help collect the whisky, was only some eight gallons. Yet the barrel capacity of the 402 barrels at 50 gallons to the barrel, was more than 20,000 gallons. If a stock of barrels with such a capacity is to be endangered in the hands of a second hand barrel dealer by agents draining out of the barrels eight gallons of an inky looking liquid and calling it a seizure of contrabrand liquor in the possession of the dealer, the law is indeed unreasonable in operation.

The District Court, erroneous as was its decision as to empty containers being forfeitable, was not so unreasonable as to hold that any "liquor" was found and seized; such a finding was left for the Court of Appeals (Record, p. 65) to make, although that court's function was to pass upon questions of law, and not to find facts which had been disputed and *not* found by the District Court.

Barrels in which whisky had been stored in bond in Government warehouse are recognized as the subject of legitimate trade. Section 3324 of the Revised Statutes, 26 U. S. C. A. 337, provides for the effacing and obliterating

of marks, stamps and brands upon the emptying or drawing off of distilled spirits from any cask or package bearing such marks, and section 3325 of the Revised Statutes, 26 U. S. C. A. 338, provides a penalty for any person who "knowingly purchases or sells, *with inspection marks thereon*, any cask or package, after the same has been used for distilled spirits". The inference is certain that, with inspection marks effaced, the sale and purchase of such casks and packages is lawful. No law of the United States makes such trade unlawful, and all persons acquainted with the liquor trade know that such commerce has been carried on since time immemorial, both before and since national prohibition.

In the case of emptying in the presence of the storekeeper gauger for bottling in bond, Regulations 23 of the Bureau of Internal Revenue, in Article 14, contained the following:

> "The placing of hot water in the packages after the spirits have been emptied therefrom and allowing it to remain long enough to recover from the wood of the package a portion at least of the spirits which have been allowed as soakage, and upon which the lawful tax has not been paid, is not permitted.
>
> "The use of sufficient water at a normal temperature for the purpose of simply rinsing the spirits from the inner surface of the package and thus securing a more effectual drainage may be permitted, but under no circumstances must water remain in the package longer than may be necessary for this purpose, and, when emptied, the package must be immediately removed from the bottling warehouse.
>
> "The water thus used can only be employed to reduce the spirits taken from the same package or packages."

This appears to have remained the regulation in force as to this matter from the time of its promulgation, December 21, 1912, until the new Bureau of Prohibition issued its Regulations No. 6 on March 31, 1928, less than six weeks before the seizure in this case. These Prohibition Regulations No. 6 superseded Internal Revenue Regulations 23, and in the matter of treatment of barrels provided as follows, in Section 18 thereof:

> "The casks or barrels must be thoroughly rinsed with pure water, preferably hot water, or steamed, which water, or as much as of it as required, should be used to reduce the proof of the spirits to 100. The water not so used to reduce the proof of the spirits should be poured upon the ground or into a sewer."

This regulation was in force when the seizure in this case was made. All of the used whisky barrels seized by the agents must have been released by the Government under either Internal Revenue Regulations 23 or Prohibition Regulations 6. Those regulations admit that a small amount of whisky remains in a barrel when the same is emptied and released for sale by the Government Storekeeper-gauger in charge.

The question at once arises, whether the Government should be considered to be releasing into general commerce property usable in the manufacture of liquor and, when obtained by one having the intent so to use it, forfeitable by the same Government under Section 25 of Title II as "property designed for the manufacture of liquor intended for use in violating" the prohibition law; or whether it should not be considered that the Government is releasing into general commerce a mere empty container.

While the Bureaus of Internal Revenue and of Prohibition recognized that by steaming or soaking the barrel in hot water a small quantity of whisky could still be recovered from the wood, yet it is apparent that the Government considered those quantities so minute that they were beneath the notice of Government. The intention of the Government to release into general commerce mere empty containers is shown by the more recent amendments of section 18 of Regulations 6, the latest of which was made by Prohibition Treasury Decision 47, under date of June 6, 1929, and which adds the following provisions to section 18:

> "In order to prevent the recovery of spirits from such empty casks or barrels, they must be treated by the following process before being removed from the premises: Place 8 ounces of washing soda (sodium carbonate) and 5 gallons of boiling water in each cask or barrel and shake well, then let stand for 30 minutes with the bung out. Bung up and let stand for 24 hours."

Why did not the Government do this ten years ago instead of releasing barrels into general commerce which it would be dangerous for a barrel dealer to deal in? And when the Government itself, under regulations duly made, releases barrels as mere "empty barrels", is not this claimant justified in dealing in them as such?

It is submitted that to this point the argument has shown

(a) That the used whisky barrels, even if they still contained minute quantities of whisky, should be considered mere empty containers, and as such subject to the interpretations of Part II of this Argument.

(b) That no liquor or whisky was seized but that all proof thereof failed, the alleged jugs of whisky being drainings made by agents, and thus not "liquor * * * intended for use in violating this chapter or which has been so used", within the meaning of section 25.

As to alleged "whisky chips", claimants have no knowledge, but it is possible that some previous owner of some of the barrels had them shaved. What of it? Whisky chips are a mere flavoring. An alcoholic liquor cannot be made from them unless in very small quantities; they may be used as they are, to make non-alcoholic whisky flavoring preparations, of which there are many on the market and sold by grocers, druggists, department stores, and others, and used for all manner of cooking and baking. That such flavors, mostly made from whisky barrel shavings, may also be used to flavor alcohol and give it a whisky taste, makes them no less articles of legitimate commerce. Most of such whisky flavors offered freely in the market are made from used whisky barrel shavings.

In addition to the shavings, which are usable only as a flavoring there were also seized a box of flavoring nuts, a case of gin extract, and perhaps other non-alcoholic flavoring extracts. Does the Government really contend that such extracts are forfeitable? If so, why not raid every grocer and druggist in the United States, for they all carry such flavors from time to time? How can the Government contend that such preparations are forfeitable when possessed by a bottle and barrel dealer, who carries *nothing* usable for the manufacture of liquor, but not forfeitable when possessed by a grocer whose store is filled with cornmeal, sugar, flour, and similar articles, all not only usable but frequently used in the illegal manufacture of liquor?

The District Court, and also the Court of Appeals, rested much on the fact that labels of various well known brands of whisky were found in claimants' possession, some of them actually attached to a few cases of bottles. Three or four such cases of labeled bottles were very effectively exhibited to the District Court and bottles from them were shown to the Court of Appeals. Probably this Court will be treated to the same spectacle, and these claimants will again be held up to view as the world's greatest "bootleggers' outfitters".

This is a piece of dramatic nonsense which is calculated to mislead and deceive a judge who is not aware of the custom of the whisky trade for the last two generations, and probably longer.

Labels of legal distillers have always been printed, bought and sold, and dealt in for purposes wholly legitimate, both before and since national prohibition.

Every distiller (generally speaking) sold a large part of his production while it was in bonded warehouse, and issued warehouse receipts to the purchasers. Under section 3 of Title II (27 U. S. C. A. 12) expressly legalizing the purchase and sale of warehouse receipts, the practice has daily continued under national prohibition. The purchasers were mostly wholesale and retail liquor dealers, and they would withdraw their own liquor when they wanted it, and would then bottle it themselves. The purchase from the distiller was always understood to carry with it the right to label the bottles with the distiller's label, so that labels long ago became a wholly legitimate article of commerce. Unless specially copyrighted or covered by a patent office

design, any printer could print them. Distillers encouraged their use, for they tended to advertise the distiller.

After prohibition bottling by wholesale dealers and by wholesale druggists for the medicinal trade continued until about 1923 when retail druggists were limited by regulation to bottled in bond spirits (see Internal Revenue Treasury Decision 3418, dated December 22, 1922); but about the same time the concentration warehouse act of February 17, 1922, now 26 U. S. C. A. 420, became effective in operation and caused many kinds and makes of whisky to be stored in each concentration warehouse, and there was a demand for labels for each kind. In such manner labels continued to be a subject of recognized legitimate commerce which every general bottle dealer must and should carry.

The inferences drawn from labels by the District Court and the Court of Appeals are wholly unjustified. And exactly the same thing may be said as to strip seals, which the Government agents and attorneys call "counterfeit strip stamps", when there is no more similitude to real strip stamps than there is between stage money and real paper money. Strip seals were used on bottles long before the Government provided for their issuance as strip stamps showing bottling in bond. The Government simply adapted to its purposes a practice already existing. Dealing in such papers as labels and seals is a lawful trade because no law makes it unlawful; bootleggers may at times buy bottles, labels and seals, with corks, cartons, wrappers and twine, but the sale of any one of these articles is lawful, and the sale of all of them together, even as a "set-up", as the Court of Appeals called it, is likewise lawful. Why should not a bottle dealer supply other lawful articles of commerce for his customers if they desire them?

IV. EVEN IF SOME OF THE SEIZED ARTICLES ARE CONSIDERED USABLE FOR LIQUOR MANUFACTURE, YET SEIZURE AND FORFEITURE IS IMPROPER IN THE ABSENCE OF A PROVED INTENTION ON THE PART OF THE POSSESSOR THAT HE HIMSELF WILL SO USE THEM.

We have seen by the considerations of Part II of this Argument that the *design* of section 25 consists of two elements, (a) that the property must be *usable* in the manufacture of liquor, and (b) that there must be the *intention* to use it for *illegal* manufacture. Part II addressed itself to the *usability in manufacture* of empty containers, showing that empty containers are usable only *after* manufacture, and not *in* or *during* such process.

Part III of the Argument addressed itself to the question as to what articles there are in the libeled list that are not merely empty containers, and contained an argument that used whisky barrels, which may contain a few thimblesful of whisky and may also contain a little whisky soaked into the wood, are still to be regarded as mere empty containers.

But whether that is the case or not, it is clear that flavoring extracts, including the so-called "whisky chips" or barrel shavings, are not within the designation "empty containers" and may be usable during manufacture. This Part IV therefore is intended to cover particularly all such articles; it does, in fact, cover everything on the list (assuming that the alleged liquor is entirely eliminated as explained in Part III).

With the argument about to be given, empty containers are doubly covered, for the proposition of law of Part IV

is, that the second element of "design", namely, the intention of using the article illegally, is entirely lacking in this case.

Remembering that claimants were the Feitler Bottle Company, and that their business was mercantile, the "dealing at retail and wholesale in new and used bottles, cooperage and other lawful articles of trade", as stated in the Answer (Record, p. 6), and as expressly testified to by both partners (Record, pp. 37 and 42), their intention, as possessors of this stock in trade, was *to sell the same.* They may, or may not, have believed, or known, that some of the goods they sold might or would be used by the buyer in connection with the illicit traffic in liquors, but it is unimportant whether they know that fact or not, since *their only intention was to sell the articles.*

In this respect section 25 differs from section 18, which section, it will be noted, does not authorize seizure or forfeiture, but simply makes it "unlawful" to "possess for sale" certain articles, which do *not* include empty containers, which are "advertised, designed or intended for use in the unlawful manufacture of intoxicating liquor."

It is submitted that under a sound interpretation of the National Prohibition Act sections 18 and 25 do not overlap, but each applies to its particular field. Section 18 applies to the manufacturer, seller or possessor for sale of property usable in the manufacture of liquor and applies criminal penalties (but not forfeiture) when he has the intention that his articles shall be so used by the buyer. As contrasted with this, section 25 applies to the possessor of liquor or of usable property which *he himself* intends to use for the manufacture "of liquor intended for use in

violating this chapter". Section 25 not only applies criminal penalties, but it also applies seizure and forfeiture of "such liquor and property".

Such, on the whole, has been the construction placed by the courts upon these two sections.

Before proceeding to cite the cases relating to these points, it should be noted as follows:

(1) Under the National Prohibition Act *the only possession for sale that justifies seizure and forfeiture* is possession for sale of *liquor* (section 25).

(2) As to "property designed, etc.," the only possession that justifies seizure and forfeiture is possession of usable property *with the intention on the part of the possessor that he himself will use such property in the illegal manufacture of liquor which he himself intends to use in violation of law* (section 25).

(3) Possession *for sale* of "property designed, etc.," does not carry seizure and forfeiture as a penalty, either under section 18 or section 25, but, under section 18 and section 29, carries only a fine for first offense even when all the various elements of section 18 are fully proved.

(4) Possession *for sale* of property either *not usable* for manufacture (such as bottles) or *not specifically intended* and sold to be illegally used (which intention must be proved as an *independent fact)* carries not even a criminal penalty, much less a forfeiture penalty under section 25.

The argument of this Part IV is directed to the proposition that the case in hand falls within the last of these four

classifications; or, at the worst, this being a forfeiture case in which criminal liability is not directly involved, that it may possibly, as to a few of the articles, fall under the third classification, and cannot possibly carry forfeiture as a penalty.

With this analysis of the provisions as enacted by Congress, the citation of the cases bearing upon the questions involved may be very brief, and the cases may be cited in chronological order.

In the case of *Hunter v. United States* [1922, 5th Cir.], 279 Fed. 567, the defendant was convicted of making mash, wort or wash fit for distillation, the evidence showing that, in boiling down syrup, a tub of skimmings had fermented. On appeal, it appearing that the element of intention to manufacture liquor was lacking, the court reversed the conviction, saying there was no evidence "that the defendant made any fermented skimmings, or that the skimmings were not merely the residuum lawfully remaining from the conversion of sugar cane into syrup."

This case indicates that the 2nd classification above is a correct statement of the law.

In the case of *Rossman v. United States* [1922, 6th Cir.], 280 Fed. 950, there were two counts, the first under section 25 of illegal possession of "property designed, etc."; the second under section 18 of illegal possession for sale of a still. The evidence showed possession of a still for sale, followed by a sale thereof to prohibition agents ostensibly for the purpose of illegal manufacture. After conviction on both counts, the defendant appealed, the court holding that the evidence brought the case clearly within section

18, but that, since "there is no evidence in this record tending to show that the plaintiff in error intended to use this property for the manufacture of intoxicating liquors in violation of the National Prohibition Act", there should have been no conviction under section 25.

This case indicates that the 3rd classification above is a correct statement of the law.

In the case of *Nosowitz v. United States* [1922, 2nd Cir.], 282 Fed. 575, the charge was illegal manufacture and possession of a still for sale, under section 18. There was no proof that the defendant intended the still to be used for illegal manufacture. On appeal from conviction, the court held that this illegal intention must be "proved as an independent fact, or at least circumstances established from which it would be proper to permit a jury to find such intent * * * The fact that it was possible to use the vessel as a still or a part thereof, is not sufficient."

This decision supports the 4th classification above as a correct statement of law.

In the *Nosowitz* case, the lower court imposed a jail sentence for a first violation of section 18. The court specifically held that such a sentence was improper, since fine was the only penalty provided. In this the case supports the 3rd classification above as a correct statement of law.

The case of *United States v. Horton* [1922, Ala.], 282 Fed. 731, was a demurrer to an indictment under section 25 charging illegal possession of a still and other property "designed and intended for use in the manufacture" of liquors but without specifying that the *defendant* intended

to use the property for illegal manufacture. The court held that under section 25 the intention to use the liquor or property illegally is the intention *of the possessor*, the court saying:

> "A still may be designed by its maker for the 'manufacture of liquor'; but this design would not make its possession by a third person unlawful, unless such third person intended to use it in the manufacture of liquor in violation of the provisions of the act. We therefore see that an unlawful intent on the part of the possessor is an essential part of the offense of having either liquor or property designed for the manufacture of liquor, in one's possession."

This case indicates that the 2nd classification above is a correct statement of law.

The case of *Hammerle v. United States* [1925, 6th Cir.], 6 F. (2d) 144, was an indictment under section 18. On objection to the wording of the indictment, which was worded like the statute, the court held it sufficient, since it could and should be understood to mean an intent by the *seller* that the substance be used for an unlawful purpose. The court said, after quoting the words of the indictment:

> "Possibly this language might be satisfied by showing possession by Hammerle but unlawful intent by his vendee only; and, while *in that event the defendant could not be convicted*, the result would be because of the proof, and not because of the indictment."

As to its ruling as to the real meaning of section 18, the court was right, and the case indicates that the 4th classification above is a correct statement of the law; but,

quaere, whether the court was right as to the wording of the indictment.

The case of *Stroh Products Co. v. Davis* [1925, Mich.], 8 F. (2d) 773, was a review of a refusal of a permit, based on the ground that the plaintiff made malt which was used to make beer, but which has many other uses. It was held that this was not enough to justify refusal of permit, but it must be shown that the malt was made and sold *with the intent on the part of the seller* that it be used in illegal manufacture. This was not shown, and refusal of the permit was reversed.

This case indicates that the 4th classification above is a correct statement of law.

The case of *United States v. 301 Cans of Acme Malt Extract* [1928, Mass.], 28 F. (2d) 213, was a forfeiture libel, *under section 18*, of a stock of malt extract, sugar, yeast, and other similar articles capable of use in making liquor, but held for sale by the owner. As indicated by the 3rd classification above, seizure and forfeiture cannot be made under the National Prohibition Act of any property which is merely *held for sale*, section 18 providing for no seizure or forfeiture. The court would possibly have been more logical in so holding, but it reached the same result by holding that the intent to sell for the purpose of illegal manufacture must be the intent of the *seller*, proved as an *independent fact*, and citing the *Rossman* and *Nosowitz* cases *(ubi supra)* as authority.

The case is thus an authority as to the correctness of the 4th classification above stated.

Finally, it is proper again to cite a case cited in Part II hereof, *Kohler Co. v. United States* [1929, 1st Cir.], 33 F. (2d) 225, holding that before there can be forfeiture under section 25, even of property usable in manufacture, it must be proved that "the actual owner thereof" intended to use it in illicit manufacture. This case indicates the correctness of the 2nd classification above stated.

In conclusion, it is submitted that even if the court should be of the opinion that some of the seized property is usable in the manufacture of liquor, yet, since the property was merely *held for sale*, and since there is absolutely no evidence that the possessors thereof had the intention that they themselves would use it in illegal manufacture, there can be no forfeiture, and the seizure was unjustified under section 25 or any other provision of law.

V. AS TO STATEMENTS IN THE OPINION OF THE COURT OF APPEALS.

Having, up to this point, developed and stated what might be regarded as claimants' affirmative argument to the effect that their possession of the merchandise was an entirely lawful possession and should not have been interfered with, it is proper, in bringing the argument to a close to call attention to some of the misstatements of fact and law made by the Court of Appeals.

Confining this comment to what the Court of Appeals said about "the third and most serious question", beginning on page 65 of the Record, claimants object to the statement of the Court of Appeals that they kept what might be called a bootleggers' outfitting establishment, to equip bootleggers with every article they would need in plying

their unlawful trade. *This is simply not true.* Claimants were dealers in empty bottles and barrels, and in such associated articles as their customers wanted. Of course the Government selected from the 57 truckloads of merchandise seized only those articles that would make it appear that claimants dealt only with bootleggers. But of course such is not the case. And as to selling "every article" needed by bootleggers, it is absolutely untrue. Claimants sold no liquor whatever, nor anything out of which liquor could be made, unless the barrels could be so designated, and at that, the Government itself would seem to be at least equally guilty in releasing such barrels. As to barrels, the *fact* is, that claimants bought them one, two or three at a time, and sold them to "bigger barrel men" (Record, p. 37), or to the North Side Cooperage Company (Record, p. 40) in lots of "fifty, thirty, forty—all small quantities."

Claimants were so far from selling to bootleggers "every article" they needed that they only sold to anybody, whether bootlegger or other person, *only* empty containers and the cartons, cases, etc., to go with the empty containers. Bootleggers certainly could not do business if they confined themselves to the articles they could buy from claimants.

Why should the Court of Appeals, or any court, make such an unfair and untrue statement about a litigant before it? The District Court, although in error in the case, made no such statement as the one here objected to.

In the same paragraph (Record, p. 65) the Court of Appeals stated that liquor was found in several partly filled cans and jugs, thereby calmly ignoring the testimony that

agents put it there; and also ignoring the fact that possession of liquor by claimants was not proved, and that the District Court did not hold that liquor was possessed.

Claimants next take exception to the statement of the Court of Appeals that the barrels had not "been treated to prevent the extraction of their liquor content", when Government regulations not only did not require such treatment when these barrels were emptied in warehouse, but they actually forbade it, as shown in Part III of this Argument.

Claimants next object to the Court of Appeals stating that there were "forged strip stamps" found, when the strip seals that were found were *not* in the similitude of genuine strip stamps, the essential wording, appearance and make-up being entirely different.

In the next paragraph of the opinion (Record, p. 66) the misleading statements are in part as follows:

That this was not a heterogeneous stock in trade open to casual purchasers desiring bottles, corks, etc. The fact is, it was just that.

That the stock was so selected, kept and arranged as to make separate and distinct liquor set-ups. To only a small degree was this true, but the Government, by its selection of exhibits, very greatly magnified this feature, which, after all, is only good commercial practice.

That claimants sold "everything" necessary for an illicit gin plant, except, perhaps, the basic alcohol in large volume. Claimants sold no alcohol at all, either in large or small quantities, and they sold *nothing* that an illicit gin

plant might want except, possibly, empty bottles, corks and cases, with some non-alcoholic flavoring. Claimants sold neither utensils for manufacture nor materials for manufacture. How, then, can the Court of Appeals' statement be true?

The Court of Appeals said that "admittedly, some of the articles were susceptible of direct use in the physical and chemical manufacture of intoxicating liquor." Claimants have not admitted any such thing. If the barrels contained any liquor soaked into the wood or adhering to the inside, that liquor had already been "physically and chemically" manufactured, and that manufacture had been a legal one. The Court of Appeals then proceeds to say that these articles "might readily be determined * * * to be designed for that use". For that unsound proposition the Court of Appeals then cites a case which has nothing whatever to do with any known situation in the present case, the case of *United States v. 18 Barrels of Alcohol*, [1927, E. Pa.], 20 F. (2d) 186. The merchandise was there, 18 barrels of alcohol, and the court held that forfeiture depends on there being an intention to sell it illegally, which is a question of fact which must be proved. But an intention to sell "property designed, etc.," even if there were any such property in this case, would not warrant forfeiture. As shown in Part IV, the intention must be *to use* for illegal manufacture. The Court of Appeals has failed to grasp the relationship and meaning of sections 25 and 18.

The Court of Appeals then states that claimants "insistently contend that after the fluid liquor has been manufactured all other property used in connection with it, even the containers in which it is stored or carried away, do not

constitute property falling within the Act." How can the Court of Appeals make this absolutely untrue statement? It was repeatedly stated and pointed out to that court in argument that containers which had been used by being filled, and in which liquor was stored, were expressly made forfeitable by section 25, and that the contentions of claimants related only to unused, or empty, containers.

The Court of Appeals, without even slightly considering or analyzing section 25, proceeds with an involved, contradictory and confusing discussion of the "canons of statutory construction", citing a former decision of the same court that "statutes must be read in the light of their purpose", *Rodenbough v. United States* [1928, 3rd Cir.], 25 F. (2d) 13. The opinion then quotes section 18, which is evidently completely misunderstood by the writer of the opinion, for the following amazing statement follows:

> "By these provisions (Sec. 18, 25, Title II) Congress made clear its intention to stop all unlawful manufacture of liquor by shutting off the instrumentalities by which it can be made."

What does the Court of Appeals mean by this? Congress did nothing of the kind. Property usable in liquor manufacture is, and always must and will be, spread throughout the country on every hand. Sugar, cornmeal, barley, rye, yeast, abound on all sides, and all kinds of utensils, even including stills, are lawfully on the market. Does the Court of Appeals really believe that Congress has tried to, or could if it tried, "shut off the instrumentalities by which it can be made"? Does any sane person even advocate trying to do this?

Cannot the Court of Appeals see that the effort of Congress in section 18 was to punish the *intentional* manufacture and sale of property usable in liquor manufacture, and advertised and intended for use in an illegal manner, and was limited to that very restricted effort? And cannot the Court of Appeals also see that section 25 applies *only* to bootleggers—those who break the liquor laws by having or making liquor to be sold in violation of law?

Congress and the United States Government may be powerful, but even their great power would not be sufficient to "shut off the instrumentalities by which it can be made," and they most certainly have not attempted to do so, in spite of the calm announcement of the Court of Appeals to the contrary.

The Court of Appeals then proceeds to admit that bottles, corks, sealing wire, or great quantities of these articles, are ordinarily lawful articles of commerce not affected by the National Prohibition Act. Having admitted that much, the Court of Appeals proceeds with this gem of fallacious reasoning:

> "But when, not standing alone, they are assembled and put on sale with clearly forbidden property they take on a new character and themselves become contraband because intimately associated with unlawful manufacture and inseparably connected with the sale of the unlawfully manufactured produce."

The mere fact that (1) they were *not* "put on sale with clearly forbidden property", (2) they were *not* "intimately associated with unlawful manufacture", and (3) they were *not* "inseparably connected with the sale of the unlawfully

manufactured produce", does not appear to bother the Court of Appeals in the least.

But what must reasonable men think of a decision that, without any evidence whatever, and contrary to *all* the evidence in the case, in one sentence transforms mere dealers in empty containers into moonshiners and bootleggers, and follows this with the forfeiture of a stock of empty containers which, even in an illicit distillery, could not lawfully be seized and forfeited?

It is for the reversal of such a decision that these claimants bring their case to this Court.

The five parts of this Argument having now been completed, and the same having been limited to the question whether the property seized is forfeitable under section 25 of Title II of the National Prohibition Act, as specified by this Honorable Court in its order allowing Certiorari, the same is respectfully submitted to the Court for consideration.

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